BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

M. LYNETTE FLINN Claimant	)	
VS.	)	
WICHITA EAGLE & BEACON Respondent	)	Docket No. 1,011,810
AND	)	
TRAVELERS INSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant requests review of the September 20, 2004 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on March 15, 2005.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas appeared for the claimant. Lyndon W. Vix of Wichita, Kansas appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant failed to prove that her reduction in compensation was connected to her work-related injuries. Thus, claimant's request for work disability benefits was denied. The ALJ awarded claimant 13.5 percent permanent partial impairment, which was the amount the parties stipulated to as claimant's percentage of functional impairment in the Stipulation filed with the Division of Workers Compensation on April 2, 2004.

In her Application for Review, claimant lists her entitlement to work disability benefits as the only issue before the Board. Claimant contends that a causal relationship exists between the permanent wage cut she suffered and her workers compensation claim. Claimant contends she is no longer able to earn a comparable wage through no fault of her own and that her injuries have resulted in permanent work restrictions which were never accommodated by respondent. This prompted claimant in her decision to quit employment with respondent.

Conversely, respondent argues that neither the reduction in pay nor claimant's decision to leave were related to her physical condition and that claimant's benefits should be limited to her functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant started working for respondent in 1993. Claimant testified she was employed full time from August 1993 until November 1996. In November 1996, claimant entered into what is called a "job share agreement" in the celebrations section. At that time, she began working an average of 20 hours a week. Claimant testified that respondent took the pay she was previously earning as a full-time sales representative in the retail advertising department and calculated that to an hourly wage. In addition, claimant received a 10 percent total commission based on the advertising revenue from the celebrations page. This commission was to be divided equally between claimant and her coworker. At that time, claimant‘s hourly rate of pay was $16 per hour. Her hourly rate remained $16 per hour until June or July 2003. Once claimant began work in the celebrations section, her fringe benefits were prorated, which resulted in her receiving half of the full-time benefits and half of the full-time amount of vacation. She retained her 401-K plan.

The job share agreement was between claimant and another coworker, Melody Dodge. While most of the other sections of the newspaper are supported by retail advertising, the celebrations section generates a profit from the moneys paid by individuals to have their various announcements printed in the paper. The celebrations section was created to generate revenue for respondent.

Part of claimant's position entailed taking announcements from customers, preparing the announcements for publication and laying out the page of the celebrations section. This task involved a component of development and promotion. Additionally, once a week copies of the Sunday newspaper are bundled by claimant and her coworker for delivery to the customers who had placed announcements the previous week.

Sometime in 2002, claimant began to experience problems with her hands, wrists, neck and arms. Claimant was referred to Prince Chan, M.D., who became claimant's primary treating physician. Dr. Chan performed surgery on claimant's right wrist on May 1, 2003, and eventually on her left wrist on June 11, 2003.[1] Claimant testified that she missed no work as a result of her injuries or the subsequent surgeries and continued to work her full schedule. The parties stipulated to an ending date for her series of repetitive use traumas of June 10, 2003, the day before her last surgery. June 10, 2003, therefore, is the date of accident for computation purposes. Claimant's last day working for respondent was May 12, 2004.

In March 2003, respondent realized that due to the slow economy, the newspaper's revenues were lagging behind budget. As a result of this deficit, respondent determined it would be necessary to decrease expenses by $1 million. The newspaper's operating committee was in charge of reviewing all costs associated with personnel, outside service expenses and the operational costs to respondent. The operating committee is comprised of vice presidents from all major areas, which includes such departments as advertising, production, news and circulation.[2]

Wendell Funk is the advertising director of classified ads with respondent. The celebrations section falls under the classified ads department, and Mr. Funk oversees the entire department. Mr. Funk was part of the operating committee. He testified that in March 2003, respondent recognized the shortfall of revenue and took measures to try to drive revenue up. Doing so required a significant reduction of respondent's costs and expenses. It was at this point that three task forces were initiated within the operating committee. One task force was designated to look at personnel, *i.e.*, employee costs and associated expenses; another group reviewed newsprint and all outside services expenses, such as printing; and the third task force analyzed all operational costs. Mr. Funk testified respondent had a $1 million shortfall and that was the number they were trying to make up on the cost side. Essentially, respondent was trying to decrease expenditures.

Mr. Funk testified that in May 2003, a newsletter was furnished to all employees describing the bleak situation. The newsletter described the $1 million shortfall and explained its plan to reduce costs, including the elimination of some positions.

In June 2003, respondent issued another newsletter describing once again its cost-cutting efforts attributed to the economic downturn. Mr. Funk testified compensation reductions occurred temporarily to senior management and that other employees had reduced hours, which resulted in pay cuts along with salary increases being postponed.

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[1]R.H. Trans. at 24.

[2]Funk Depo. at 7.

In analyzing the earnings and overhead of the celebrations section, the task force found that there were insufficient profits to allow for increases in compensation. It was recommended that the hourly rate of the claimant and her coworker be reduced to $15 per hour. Also, it was recommended that claimant and her coworker's commission be reduced to 5 percent if revenue goals were met and 2.5 percent if revenue goals were not met, to be divided equally between claimant and her coworker. Before this time, the celebrations section did not have revenue goals. These recommendations were sent to the operating committee for final decision. In early June 2003, the operating committee approved the recommended adjustments.

Mr. Funk testified he was aware claimant had a physical condition because he had noticed she had a wrist support on her wrist. He was not aware that her coworker also had a similar medical problem.

On September 26, 2003, claimant was released from medical care by Dr. Chan. At the time Dr. Chan released claimant, he indicated she did not have any restrictions but should work as tolerated.[3] Dr. Chan did not indicate if claimant was at maximum medical improvement at the time he released her.

Claimant was examined by Peter V. Bieri, M.D., on October 27, 2003, at the request of her attorney. Dr. Bieri is board certified in disability evaluations. He obtained a history, reviewed medical records and performed an examination. Upon examination, claimant described the onset of pain in the cervical and thoracic spine accompanied by pain, numbness and tingling of the upper extremities. Claimant also had complaints of neck pain that persisted following her surgical procedure. She had complaints with captive positioning and active range of motion. This was despite formal physical therapy and use of a TENS unit to the area.[4] Dr. Bieri opined that claimant has a 5 percent whole-person impairment according to the diagnosis related estimate (DRE) cervicothoracic Category II, and a 15 percent upper extremity impairment bilaterally for residuals of entrapment neuropathy, which translates to a 9 percent whole person impairment bilaterally. The combined total whole-person impairment would compute to 21 percent. Dr. Bieri concluded this would be attributable to the injury as reported.[5]

Dr. Bieri believed claimant to be at maximum medical improvement and the impairment to be permanent. When asked about restrictions given the claimant, Dr. Bieri answered that although he did not assign independent restrictions, claimant was to continue working within her pain tolerance, avoiding repetitive gripping and grasping and interrupting the captive position as needed for symptomatic relief. Dr. Bieri specifically

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[3]R.H. Trans. at 32 and Cl. Ex. 5 (April 14, 2004)

[4]Bieri Depo. at 16 and Ex. 2.

[5]Bieri Depo., Ex. 2.

testified that claimant is currently incapable of bundling newspapers, which was one of her job tasks in the celebrations section. In reviewing a task loss list prepared by Professional Rehabilitation Consultants, LLC, Dr. Bieri opined that claimant has lost the ability to perform 6 of 18 tasks for a task loss of 33 percent.

Claimant was interviewed by Jon E. Rosell, Ph.D., on November 18, 2003, at her attorney's request. Dr. Rosell is a certified rehabilitation specialist. He was the only expert to testify on claimant's ability to earn wages. He determined that with claimant's wage stipulation, her preinjury weekly wage was $493.78 and her post-injury weekly wage at respondent was from $365.24 per week to $389.31 per week. Dr. Rosell then determined that claimant's wage loss would range from 21 percent to 26 percent. Dr. Rosell's deposition was taken before claimant quit her job with respondent and went to work at Palmer Physical Therapy for Women.

Dr. Rosell also determined that based on a 15-year work history, claimant has lost the ability to perform 9 tasks out of a total of 13 tasks for a 79 percent task loss. Pursuant to K.S.A. 44-510e(a):

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, *in the opinion of the physician*, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . . . (Emphasis added.)

The Workers Compensation Act does not define "physician," but it does define "health care provider" to mean "any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology." Dr. Rosell is not a psychologist. His Ph.D. is in education, specifically Special Education Administration. There has been no testimony by a physician approving the task loss opinion of Dr. Rosell. The only testimony by a physician on task loss was that of Dr. Bieri, whose task loss opinion was 33 percent.

Claimant testified that she continued to perform her job duties without accommodations until May 12, 2004, when she voluntarily terminated her employment with respondent to accept a position as an office assistant for Palmer Physical Therapy for Women. She currently works approximately 25 hours per week and makes $13.50 per hour with no fringe benefits. This computes to $337.50 per week and represents a 38 percent wage loss from her preinjury average weekly wage of $493.78 plus $50.56 fringe benefits. Mr. Funk testified that claimant's position had still been there for her until the last day she worked and has since been filled for a base salary of $13 per hour with the same commission rate. However, claimant testified her decision to terminate was based on

> the fact that I knew I could not continue to spend the kind of time at the computer that I had been spending at The Eagle due to the problems with my neck and my hands and wrists and I had not had any success in being allowed to not do the newspaper bundling duties. The issue with the headset, I finally did call someone in technology and got an old outdated headset and, as he put it, I think I got the ear wax chipped out of it before he brought it down to me and managed to get that. But it was in poor working condition and not really all that helpful. Just the issue with the accommodations and the ongoing difficulties with my hands and neck and I knew when I was approached with the offer to go to work for . . . this other place, that it really would be in my best interest.[6]

Claimant also testified that respondent was uncooperative in providing accommodations that she needed to do her job without causing her a lot of discomfort. The requests and doctor's prescription for proper work station equipment was unreasonably delayed. Claimant said that she sat in a meeting on December 16, 2003, and explained her understanding of Dr. Chan's restrictions with regard to working within her pain tolerance. She explained to her two supervisors that the bundling, lifting and rebundling of the newspapers caused those symptoms.

The Kansas appellate courts, beginning with *Foulk*[7], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his or her pre-injury wage at a job within his or her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[8] Before claimant can claim entitlement to work disability benefits, she must first establish that she made a good faith effort to obtain or retain appropriate employment.[9]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not

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[6] Flinn Depo. at 4.

[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[9] *See Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

genuine,[10] where the accommodated job violates the worker's medical restrictions,[11] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[12]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. The claimant testified that she made a good faith attempt to perform the offered job but experienced the onset of pain as she attempted to perform the work activities.

Respondent argues claimant's permanent partial general disability should be limited to her functional impairment rating as either claimant voluntarily quit or claimant's termination was unrelated to her work-related injuries.

In *Foulk,*[13] the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, [14] the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

In January 1998, the Kansas Court of Appeals determined in *Gadberry*[15] that a worker who returned to work at her pre-injury wage but within a few weeks was terminated in a layoff was not precluded from receiving a work disability award. Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job.[16] The court stated, in part:

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[10] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[11] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[12] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[13] *Foulk,* 20 Kan. App. 2d 277.

[14] *Copeland,* 24 Kan. App. 2d 306.

[15] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[16] *Id.* at 804.

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee* [*v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995)], Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss. [17]

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment; it was never offered to her. [18]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

In the 1999 *Niesz*[19] case, the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons that were unrelated to the work injury. In that decision, the Court of Appeals held that an accommodated job artificially circumvents a work disability, but once that accommodated job ends, the presumption of no work disability may be rebutted.

> Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted. [20]

> The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed. [21]

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[17] *Id.* at 805.

[18] *Id.* at 806.

[19] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[20] *Id.* at Syl. ¶ 2.

[21] *Id.* at Syl. ¶ 3.

Consequently, the Court of Appeals held that Ms. Niesz was entitled to receive a work disability after being fired, when the circumstances surrounding the termination did not demonstrate bad faith on the worker's part.

> The fact that Niesz' accommodated position ended does not mean that Niesz ceased having work restrictions. Niesz' work disability made it difficult for her to find work in the open market. The presumption of no work disability does not apply because Niesz is no longer earning 90 percent of her preinjury wages. See. K.S.A. 1998 Supp. 44-510e(a).[22]

Thereafter, in January 2003 the Kansas Court of Appeals, in *Cavender*[23], held that a worker who had obtained other employment following a work injury was entitled to receive work disability benefits after resigning her employment for reasons unrelated to the injury. The court reasoned that the proper test to apply in these situations is whether the worker acted in good faith to retain appropriate employment and when terminated, thereafter made a good faith effort to find appropriate employment. The court wrote, in part:

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded. [Citations omitted.]
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .
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> . . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. [Citation omitted.] **In situations where post injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable.** Clearly, in the cases cited by PIP [the employer], leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. **However, the reasonableness**

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[22] *Id*. at 740.

[23] *Cavender v. PIP Printing, Inc.*, 31 Kan. App.2d 127, 61 P.3d 101 (2003).

> **of leaving employment is not limited to a decision based on work restrictions or injuries.**
>
> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. **Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions**.[24]

The Kansas Court of Appeals has consistently held that factors other than a worker's injury and permanent medical restrictions may be considered in determining whether a worker has acted in good faith to retain or to find employment. [25]

Finally, in *Roskilly*[26], the Court of Appeals put to rest the argument that an injured worker who returns to the same unaccommodated job post injury is thereafter precluded from receiving a work disability should that job end.

Accordingly, the Board rejects the arguments that before work disability benefits are available, claimant must have returned to an accommodated position or that the wage loss must be attributable to claimant's physical condition. Rather, the test is one of good faith, both on the part of the claimant and of the employer. Claimant alleges she was unable to continue performing her part-time job with respondent and that it violated her medical restrictions. However, the Board is not persuaded of this on either account. The job itself was limited to 20 hours a week. The bundling of newspapers task which claimant primarily points to as a violation of her restrictions was done on an infrequent basis, and she had help with this task. The Board views this case as one where claimant voluntarily left her employment with respondent primarily for personal, not physical, reasons. *Foulk* and its progeny are intended to prevent awarding work disability under such circumstances. Claimant's decision to terminate her employment, while obviously justified in her mind, cannot be considered to be good faith for purposes of the Workers Compensation Act. As for claimant's argument that she is entitled to work disability while still employed with respondent when her post-injury wages fell below 90 percent of her pre-injury average weekly wage, the Board finds that the Court of Appeals' rationale in *Hernandez*[27] is applicable to these facts, and the Board is bound to follow that precedent.

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[24] *Id.* at 129-32 (Emphasis added).

[25] *See Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. 932 (2000).

[26] *Roskilly v. Boeing*, ___ Kan. App. 2d ___, ___ P.3d ___ (No. 93,093 filed July 29, 2005).

[27] *Hernandez v. Monfort, Inc.*, 30 Kan. App. 2d 309, 41 P.3d 886, *rev. denied* 274 Kan. 1112 (2002).

AWARD

WHEREFORE, the Board affirms the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 20, 2004.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority. I find that claimant's injuries significantly contributed to claimant's leaving her employment with respondent. I also find that claimant did put forth a good faith effort to retain her employment with respondent. Accordingly, actual wage loss should be used in determining claimant's permanent partial general disability under K.S.A. 44-510e.

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Lyndon W. Vix, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director